84-831

No.:_____

Supreme Court, U.S.
FILED
NOV 23 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1984

ANDREW J. DEROSA,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented For Review

1. Whether the Court of Appeals properly affirmed Petitioner's conviction for unlawful possession of two checks stolen from the mail where:

(a) the sole evidence supporting the conviction was the opinion of the prosecution's handwriting expert that Petitioner had written the payee endorsements appearing on the back of the stolen checks

(b) the trial Judge found the prosecution's expert testimony to be "shocking" and "almost incredible"; and

(c) there was no other direct or circumstantial evidence that Petitioner had possession of the stolen checks.

2. Whether Federal Rule of Evidence 702 and 28 U.S.C. §1731 authorizes the use of opinion evidence as a substitute for proof of guilt without some independent evidence tending to show that Petitioner had possession of the stolen checks.

Parties in the United States Court of Appeals

The parties to the proceeding in the United States Court of Appeals for the Second Circuit were Petitioner, Andrew J. DeRosa, as Appellant, and Respondent, United States of America, as Appellee.

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No.:_____

IN THE

Supreme Court of the United States

October Term, 1984

ANDREW J. DEROSA,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below

The judgment of conviction was entered against Petitioner in the United States District Court for the Eastern District of New York on January 25, 1984.

The United States Court of Appeals for the Second Circuit affirmed the conviction in a decision and order dated July 24, 1984, Appendix A, at 1a-3a.* The Court

*Abbreviated references in this Petition are as follows:
"a" refers to pages of the Appendix annexed to this Petition.
Numbers in parentheses refer to pages of original Trial transcript.

found that there was evidence in the record that Petitioner "...had access to the checks justifying the use of handwriting opinion evidence." The Petition for Rehearing was denied summarily on August 22, 1984, Appendix B, at 4a.

On September 25, 1984, the Court of Appeals, on its own motion, amended its original decision by deleting the sentence which found that there was evidence of Petitioner's access to the checks in the record and substituted a case citation in lieu thereof. A copy of the "ORDER AMENDING ORDER" is annexed, Appendix C, at 5a-6a.

Jurisdictional Statement

The Order and Decision of the United States Court of Appeals for the Second Circuit, as amended, was dated and filed September 25, 1984. Appendix A, at 1a-3a, Appendix C, at 5a-6a.

Statutes Involved

This case involves 28 U.S.C. §1731 and Federal Rule of Evidence 702.

Preliminary Statement

Petitioner, Andrew DeRosa, a former U.S. Postal Service employee, was convicted after a jury found him guilty on Two Counts of having unlawful possession of two checks stolen from the United States mail in violation of 18 U.S.C. §1708.

On January 25, 1984, Petition was sentenced in the United States District Court for the Eastern District of New York on Count One to a six-month prison term and four years probation, and on Count Two to four years probation, both sentences to be served concurrently.

Petitioner appealed to the United States Court of Appeals for the Second Circuit which, after argument,

affirmed the conviction. On its own motion, the Court of Appeals amended its original decision by deleting its finding that there was evidence in the record that Petitioner had access to the stolen checks during the course of his employment.

This Petition presents to this Court an important and unresolved question of whether a defendant in a federal criminal trial may be convicted for possession of stolen checks *solely* upon opinion evidence of a handwriting expert that a defendant had written the payee endorsements appearing on the back of the stolen checks. Petitioner remains convicted solely upon the opinion of a handwriting expert called by the prosecution that Petitioner had written the payee endorsements. Petitioner denied that he had written the endorsements, and offered his own handwriting expert to support his claim at trial.

Statement of the Case

A. The Theft of the Two Checks

The two checks, which were the subject of this prosecution, had been mailed from business offices located in Melville, New York, at the close of business on June 15, 1982. A check payable to Kenneth Bond in the amount of $300 was mailed by I.B.E.W. Local 25 Welfare Fund from their offices located at 425 Brush Hollow Road, Melville, New York. A check payable to Jeffrey Markowitz in the amount of $611.96 was mailed by the Home Insurance Company from their office buildings, at the end of the business day and were to be collected by employees of the Huntington Station Post Office where Petitioner had been employed for several years. (42-44, 331-32, 100)

The record showed that at the time the checks were deposited, Petitioner had no longer been working that day for the post office. Petitioner had punched out at 3:50 p.m. (134). The checks were not deposited into the mailboxes until 5:00 p.m. at the end of the business day (100, 331-32).

The two checks were stolen by unknown, unidentified individuals from the mail and later cashed at two separate banks. The Bond check was cashed on June 17, 1982 at the Melville branch of Long Island Trust Company; the Markowitz check was cashed on June 18, 1982 at a branch of Citibank at 399 Park Avenue, New York, New York. Petitioner did not cash the checks, and there was no evidence as to the identity of the check cashers (78-86, 109-10, 116-17).

B. The "Proof" of Petitioner's Alleged Possession of the Stolen Checks

The prosecution's proof of possession rested solely upon the testimony of its handwriting expert, Edward J. Smith, who was employed by the United States Postal Service. The prosecution rested upon the theory that if the proof showed that Petitioner had endorsed the payee names on the back of the checks, the jury could find him guilty as charged. The only other evidence in the prosecution's case consisted of the undisputed fact that Petitioner had been an employee of the post office station which was responsible for the collection of the two checks.

Smith's testimony was based upon his examination of the endorsement of the two checks and over 340 handwriting exemplars furnished by Petitioner, voluntarily, during the course of the Postal Service investigation (178-84). Smith testified that, in his opinion, Petitioner had endorsed the payee names on both checks (231).

Smith conceded, however, that there were apparent differences between the endorsements and Petitioner's vertical writing style. Specifically, there was a major and significant difference between the angular, slanted style on the endorsements as opposed to Petitioner's vertical style. Smith explained that these differences were attributable to the fact that when Petitioner endorsed the checks, he may have been standing and not

sitting, as he had been when he gave the exemplars (217-28). This explanation was material to reach his opinion that Petitioner had written the payee endorsements.

Following cross-examination, however, Smith suddenly reversed himself and claimed that whether appellant was standing or sitting made no difference in his opinion for these marked dissimilarities between the endorsements and Petitioner's exemplars (273-76).

At the close of the prosecution's case, defense counsel moved for dismissal upon the alleged failure of the Government to prove a prima facie case. It was conceded that the sole evidence of possession depended upon the testimony of the handwriting expert. On this occasion, the trial judge expressed his own impression of the prosecution's handwriting expert. The judge found Smith's testimony to be "rather shocking" and "almost incredible." After three hours of testimony over two days of trial, Smith suddenly abandoned his explanation for the obvious differences in handwriting style between the check endorsements and Petitioner's exemplars (Appendix D, 7a-9a). The trial judge concluded by telling the prosecutor (10a):

> Now, I don't say that it is not going to go to the jury, but I tell you now, counsellor, that his testimony is near the point of challenging the entire credibility of that witness.
>
> That is very rare and in twenty years on the bench, I have never done it and I am not going to do it here.

It was under these circumstances that Petitioner proceeded with his defense at trial.

Petitioner called his own handwriting expert. James Horan, a member of the faculty of John Jay College of Criminal Justice, with over 25 years experience examining documents, testified that there were so many dissimilarities between the endorsements and Petitioner's

exemplars that, in his opinion, Petitioner did not write the endorsements (366).

Petitioner testified in his own defense. Petitioner emphatically denied that he had any knowledge or involvement in the theft of the stolen checks, and that he had ever possessed or wrote the endorsements on the checks. Petitioner testified that he never had the opportunity to collect the mailed checks in question (406, 410-11, 417-18, 439-40).

C. The Court of Appeals Decision

On appeal, Petitioner contended that his conviction should be set aside because there was no direct or indirect evidence of possession of the stolen checks, and that his conviction rested solely upon the opinion of the prosecution's handwriting expert. Petitioner contended that his conviction therefore was the product of an expert opinion, rather than competent evidence sufficient to sustain a finding of guilt as a matter of law.

Petitioner contended that both Federal Rule of Evidence 702 and 28 U.S.C. 1731, as well as a line of court decisions, required that before the admission of expert testimony, there should be an evidentiary link between the checks and Petitioner. The Court of Appeals originally agreed with Petitioner's contention and made the following finding (Appendix A, 2a):

> Any link between the checks and appellant that may be required to be shown before the introduction of the exemplars was provided by the expert testimony and the evidence that appellant had access to the checks. See United States v. Ranta, 482 F.2d 1344, 1346 (8th Cir. 1973) (per curiam) (defendant's fingerprint on check sufficient to allow admission of exemplars even when expert unable to testify to authorship).

Petitioner filed for a rehearing upon the ground that the Court misapprehended the record which failed

to reveal that appellant had access to the stolen checks. The Petition was summarily denied on July 24, 1984.

On September 25, 1984, however, the Court amended its decision and deleted the foregoing quoted sentence. The Court substituted the citation of *United States* v. *Swan*, 396 F.2d 883, 884-85 (2d Cir. 1968), in place of the deleted finding of fact.

As a result of the deleted sentence and insertion of the *Swan* decision, Petitioner contends that he remains convicted solely upon the opinion of a handwriting expert that Petitioner had written the payee endorsements on the stolen checks.

Reasons for Granting the Writ

A Writ of Certiorari Should Issue to Resolve the Question of Whether Opinion Evidence of a Handwriting Expert Should Be Permitted to Constitute the Sole Basis for a Criminal Conviction for Unlawful Possession of the Stolen Checks Without Any Independent Evidence Tending to Connect Petitioner With the Stolen Checks.

We respectfully submit that this Petition presents an important question that should be resolved by the exercise of this Court's supervisory power over the administration of criminal justice in the federal court system. The result reached in Petitioner's case shows that a defendant may be convicted solely upon the opinion of a handwriting expert who has no personal knowledge or involvement in the crime alleged in the criminal proceeding. Petitioner's case presents a question which directly affects the integrity and reliability of our fact-finding process in the federal criminal justice system.

We submit that Petitioner presents an extreme case which would permit citizens to be convicted solely upon handwriting expert opinion in a field which is concededly an inexact art and science.

This Court has in the past exercised its supervisory role over the criminal justice system in granting petitions for certiorari. See, for example, *United States* v. *Hale*, 422 U.S. 171, 95 S.Ct. 2133, 2135 (D.C. 1975) [certiorari granted because of the importance of the question to the administration of justice]; *Elkins* v. *United States*, 364 U.S. 2096, 80 S.Ct. 1437, 1143 (Or. 1960) [the Court formulated rules of evidence to be applied in federal criminal prosecutions]; *Carbo* v. *United States*, 364 U.S. 611, 81 S.Ct. 338, 339 (1961) [effective administration of criminal justice required this Court's decision]. See also Justice Black's comments in his dissent to the Amendments to the Federal Rules of Civil and Criminal Procedure 86 S.Ct. at Rules 232, 233 and Justice Douglas' comments concerning the Federal Rules of Evidence at 409 U.S. 1132.

We respectfully submit that the record in this case shows that there was no evidence independent of the handwriting expert's opinion tending to connect Petitioner with the checks stolen from the U.S. mail. The expert's opinion became tantamount to an opinion of defendant's guilt. As Petitioner argued before the Court of Appeals, the record showed that Petitioner was not assigned to the mail route where the checks were deposited for mailing, and was not on duty at the time of the deposit of the checks into the mail.

The Court of Appeals amended decision confirms that there was no evidence that appellant had access to the checks, which would have justified the inference that appellant had possession of the stolen checks when coupled with the handwriting expert opinion.

The Court of Appeals substitution of the citation *United States* v. *Swan, supra*, for its prior finding that there was evidence that appellant had access to the checks, is, we respectfully submit, wholly inapplicable. Swan had been prosecuted for fraudulently obtaining goods through mail orders. The goods were sent to Swan's home. A co-defendant testified to Swan's involvement. School records were admitted bearing Swan's

handwriting and relied upon by a handwriting expert to prove that Swan prepared the false mail orders. Thus, there was substantial independent evidence in addition to the handwriting expert's opinion to support the finding of guilt. Swan objected only to the use of the school records as exemplars. The *Swan* case did not challenge the sufficiency of evidence as contended by Petitioner on appeal.

The Court of Appeals decision ignored a line of previous decisions which required evidence tending to connect the defendant with the questioned document before accepting expert handwriting opinion. *United States* v. *Ranta*, 482 F.2d 1344 (8th Cir. 1973) [defendant's fingerprint found on check]; *United States* v. *Kimbell*, 487 F.2d 219 (5th Cir. 1973) [defendant's license plate number recorded as identification on check by cashier]; *United States* v. *Hayes*, 631 F.2d 593 (8th Cir. 1980) [defendant's alias appeared as endorsement on check]; *United States* v. *Hall*, 632 F.2d 500 (5th Cir. 1980) [defendant's name appeared as endorsement on check].

The Court of Appeals decision also ignored the statutory requirement of 28 U.S.C. 1731 which permits the use of handwriting exemplars for comparison purposes only ". . . to determine the genuineness of other handwriting *attributed* to such person" (emphasis supplied). In Petitioner's case, the exemplars were admitted to determine the genuineness of the handwriting endorsement on the stolen checks, despite the absence of any evidence attributing the checks to Petitioner.

We respectfully submit that the Court of Appeals decision contravenes the purpose for which expert testimony is used in federal criminal trials to assist juries in determining guilt or innocence of a defendant. Federal Rule 702 permits the use of expert testimony only where it will "assist the trier of fact to understand the evidence or to determine a fact in issue." A clear reading of 702 shows that it presumes that there is evidence before

the jury which would require the specialized assistance of an expert to aid in an understanding of such evidence. The Court of Appeals decision, however, goes well beyond the purpose of assisting a jury, and permits the substitution of expert opinion for proof of guilt.

This concern has recently been expressed in another Second Circuit opinion, *United States* v. *Young*, ____ F.2d ____, Slip Op. Nos. 897, 931, 879, 932, 900, 899, Decided Sept. 17, 1984, only one week before the Amended Decision in Petitioner's case. In a narcotic conspiracy case, the Government used experienced nar-cotic detectives to offer their opinions concerning de-fendants' observed conduct as evidence of their involve-ment in narcotic activities. The propriety of the use of this opinion evidence was challenged on appeal. The Court upheld the conviction and the use of the expert testimony. In a concurring opinion, however, Circuit Judge Jon Newman expressed concern over the use of expert opinion as a substitute for proof of guilt. At page 6287, Judge Newman wrote:

> If the observed actions of a defendant do not establish a prima facie case, I do not believe that an expert's opinion that his actions are criminal may carry the prosecution's proof above the requisite line. It is one thing to permit a jury to weigh that opinion in considering an otherwise adequate case; it is quite another matter to let that opinion salvage an insufficient case.

The concerns eloquently expressed by Judge Newman state Petitioner's case. No clearer case could be presented where a conviction rests solely upon expert opinion evidence where the prosecution otherwise failed to prove Petitioner's possession of the stolen checks.

The *Young* opinion also reveals the growing trend of federal criminal prosecutions relying upon the use of an expert opinion as evidence of guilt. In 1964, in *United States* v. *Sette*, 334 F.2d 267, 269 (2d Cir. 1964)

the Second Circuit had refused to allow investigating agents to offer their opinion that observed activities of a defendant indicated the commission of criminal activity. The Court there found that the prosecution was using expert opinion to overcome insufficient proof of guilt. More recently, however, since 1978, various Circuits have been permitting investigative experts to render opinions of observed conduct as criminal in nature. See *United States* v. *Fleishman*, 684 F.2d 1329, 1335-36 (9th Cir.) [defendant's role as "lookout" in drug transaction], *cert. denied*, 459 U.S. 1044 (1982); *United States* v. *Scavo*, 593 F.2d 837, 840, 843-44 (8th Cir. 1979) [defendant's role in gambling operation]; *United States* v. *Masson*, 582 F.2d 961, 963-64 (5th Cir. 1978) [same]. As indicated in the concurring opinion of Judge Newman, however, this trend has been reaching to substitute opinion evidence for proof of guilt.

We respectfully submit, therefore, that the issue presented by this Petition is one of substantial importance to the administration of federal criminal trials, which are in need of guidance as to the extent to which expert opinion evidence may be used to support a criminal conviction. Here, the record shows that the prosecution's own expert conceded that handwriting analysis is an inexact art and science and that the opinion of those skilled in the field is based upon probabilities far short of mathematical certainty (388-89). The trial judge found the prosecution's expert's testimony to be "shocking" and "almost incredible" (7a-9a). The judge further stated that he found the defense expert to be more credible than the prosecution's expert. The Judge felt constrained, however, not to usurp the function of the jury and permitted the jury to resolve the question of guilt (14a).

Thus, the Petitioner remains convicted solely upon the opinion of a handwriting expert who gave "shocking" and "almost incredible" testimony and his right to liberty fell into the hands of an unskilled lay jury who were forced to undertake their own handwriting

analysis to determine guilt or innocence. We submit that such an onerous result should not be condoned in federal criminal trials and that this petition for certiorari presents a sufficiently important question of law to be determined by this Court.

Conclusion

The Petition for a Writ of Certiorari should be granted and upon certiorari, the judgment of conviction should be ordered vacated and the indictment should be ordered dismissed.

Respectfully submitted,

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APPENDICES

Appendix A
Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 24th day of July one thousand nine hundred and eighty-four.

Present: HONORABLE THOMAS J. MESKILL,

HONORABLE RICHARD J. CARDAMONE,

HONORABLE MAX ROSENN,*

Circuit Judges.

Docket No. 84-1061

Filed: July 24, 1984

UNITED STATES OF AMERICA,

Appellee,

v.

ANDREW DE ROSA,

Defendant-Appellant.

This is an appeal from a judgment of conviction, after a jury trial, entered by the United States District Court for the Eastern District of New York, Altimari, *J.*, on two counts of unlawful possession of checks stolen from the United States mail in violation of 18 U.S.C. § 1708 (1982).

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* Honorable Max Rosenn, United States Circuit Judge for the Third Circuit, sitting by designation.

Appendix A
Opinion of United States Court of Appeals

This cause came on to be heard on the transcript of record from said district court and was argued by counsel.

The judgment of conviction is AFFIRMED.

There was sufficient evidence presented by the prosecution and by appellant to sustain the jury's verdict. *See United States* v. *Singleton*, 532 F.2d 199, 202-04 (2d Cir. 1976) (court considers evidence offered by prosecution and defendant in determining sufficiency claim). "Disbelief of a defendant's own testimony may provide at least a partial basis for a jury's conclusion that the opposite of the testimony is the truth." *United States* v. *Martinez*, 514 F.2d 334, 341 (9th Cir. 1975). The handwriting exemplars were admissible, for purposes of jury comparison, to determine if appellant had forged the signatures on the checks. 28 U.S.C. § 1731 (1982). Any link between the checks and appellant that may be required to be shown before the introduction of the exemplars was provided by the expert testimony and the evidence that appellant had access to the checks. *See United States* v. *Ranta*, 482 F.2d 1344, 1346 (8th Cir. 1973) (per curiam) (defendant's fingerprint on check sufficient to allow admission of exemplars even when expert unable to testify to authorship). It is within the discretion of the district court to decide whether the expert is qualified and whether his testimony is admissible. *Havenfield Corp.* v. *H & R Block, Inc.*, 509 F.2d 1263, 1272 (8th Cir.) (qualifications of expert), *cert. denied*, 421 U.S. 999 (1975); *New Mexico Savings & Loan Association* v. *United States Fidelity & Guaranty Co.*, 454 F.2d 328, 335 (10th Cir. 1972) (need for expert testimony.

Appendix A
Opinion of United States Court of Appeals

Appellant claims that the admission of evidence concerning his prior bad acts was prejudicial. Appellant, however, did not object to the admission of the evidence below. The admission of the evidence did not constitute plain error. Fed. R. Crim. P. 52(b). *See United States* v. *Atkinson*, 297 U.S. 157, 160 (1936).

/s/
Thomas J, Meskill, U.S.C.J.

/s/
Richard J. Cardamone, U.S.C.J.

/s/
Max Rosenn, U.S.C.J.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Appendix B
Order of United States Court of Appeals on Petition for Rehearing

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 22nd day of August one thousand nine hundred and eighty-four.

No. 84-1061

Filed: August 22, 1984

UNITED STATES OF AMERICA,
Appellee,

v.

ANDREW J. DEROSA,
Defendant-Appellant.

A petition for rehearing having been filed herein by counsel for the defendant-appellant, Andrew J. Derosa,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/
Elaine B. Goldsmith,
Clerk

Appendix C
Order Amending Order of United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1983 Decided July 24, 1984

Docket No. 84-1061

Filed September 25, 1984

UNITED STATES OF AMERICA
Appellee,

v.

ANDREW DE ROSA,
Defendant-Appellant.

Before: MESKILL, CARDAMONE and ROSENN,*
Circuit Judges.

ORDER AMENDING ORDER

The order of the Court dated July 24, 1984, is hereby amended as follows:

1. *Page 2, line 5:* Delete from "Any link between . . ." through "authorship)." on line 11, and substitute the following citation in place thereof:

> *United States* v. *Swan*, 396 F.2d 883, 884-85 (2d Cir. 1968).

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* Honorable Max Rosenn, United States Circuit Judge for the Third Circuit, sitting by designation.

Appendix C
Order Amending Order of
United States Court of Appeals

/s/ _____
Thomas J. Meskill, U.S.C.J.

/s/ _____
Richard J. Cardamone, U.S.C.J.

/s/ _____
Max Rosenn, U.S.C.J.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Appendix D
Excerpts from Trial Transcript

(88) * * *

MR. COOPER: Okay. And in order to prove the possession of the check, the Government would have to prove the check either at any time -- they would have to prove possession of the check in the hands or in the custody and control of the defendant DeRosa.

THE COURT: Yes. And if indeed he endorsed (89) them as has been alleged, then he is in possession.

MR. COOPER: If he endorsed them, then he is in possession of them and it could be adduced from that that the forgery gave him the possession, that gave him the intent to deprive the owner, the criminality.

The only testimony that we have in -- that we have heard that could connect the defendant with those two checks was the testimony of Mr. Smith.

I submit to the Court that the testimony of Mr. Smith, the nature of it, the flavor of it is insufficient on the face of it and for that reason the People have failed to make out a prima facie case.

THE COURT: Mr. Gold, do you wish to be heard?

* * * * *

(90)

MR. GOLD: Fine.

In that case, your Honor, I think that Mr. Smith's testimony stands on its own. That certainly makes out a case that we feel is beyond a reasonable doubt in so far as --

THE COURT: Counsellor, his testimony was almost incredible.

MR. GOLD: I don't know what that means.

Appendix D
Excerpts from Trial Transcript

THE COURT: It means that for at least three hours he testified that the difference between the known and the unknown was that one was done at a teller's cage in a standing or crouched position, and the others were done in a seated and relaxed position.

After hours and hours of that judgment (91) and opinion, you then attempt to rehabilitate him and this witness, who obviously will go in any direction you ask him to go into, then says, "No, it doesn't really matter whether you are standing or whether he was seated."

I tell you, Mr. Gold, that you had to feel a pinch of pain when that answer was elicited because after hours of that kind of testimony for him now to say, "It makes no difference," was rather shocking to this Court.

MR. GOLD: Judge, I think perhaps there is some misunderstanding here because what you classify and categorize as hours of testifying that he was in a standing position, in fact, he never said that.

THE COURT: He never did?

MR. GOLD: No, sir.

What he repeatedly stated over and over again, despite the number of questions and the attempt to put that language in his mouth, was that that is a possible explanation and an opinion of his that it is consistent --

THE COURT: Let me tell you what his testimony was.

His testimony was "I was not there."

(92)

MR. GOLD: Correct.

THE COURT: "I did not see whether the person who wrote was standing or seated."

Appendix D
Excerpts from Trial Transcript

MR GOLD: Correct.

THE COURT: "And therefore I cannot tell you from my own senses, by either smelling, seeing, hearing, et cetera, that he did, in fact, stand up, whoever it was that wrote that check or signed that check."

MR. GOLD: Correct.

THE COURT: "But in my judgment, because of the characteristics of the letters in an upright position, in my opinion, my professional opinion --" he said over and over and over again, "That, in fact, it was done while the person was standing. I cannot testify with any certainty that he did, in fact, stand because I wasn't there but it is my judgment that he was standing."

MR. GOLD: That he was not in a seated, comfortable position.

I believe that was the bottom line of what he said.

THE COURT: Counsellor, I said it was almost incredible. I didn't say it was incredible.

(93)

MR. GOLD: Well, your Honor is casting some aspersions on --

THE COURT: Very clearly.

MR. GOLD: And I think I have an obligation to respond to that.

THE COURT: Counsellor, let's start with your witness.

Yesterday he testified he was an author of a book about to be published.

MR. GOLD: Correct.

Appendix D
Excerpts from Trial Transcript

THE COURT: When questioned as to the whereabouts of the book, he indicates that it is in the hands of the publisher.

MR. GOLD: Correct.

THE COURT: I then said to him, "Mr. Smith, is it possible that you have given your entire manuscript to the publisher and haven't retained a copy for your home file or for whatever other purpose a reasonable person might retain a copy for?"

He says, "No, I don't have it. I gave it all to the publisher."

MR. GOLD: I believe he said, sir, that he did not have a complete set of the book.

(94)

THE COURT: Then upon further questioning he said, "I have a part of it."

Then upon further inquiry where it became clear to him that I looked at him with great disbelief that someone would write a book and give everything to the publisher and never keep anything, now we find there is a percentage of the book that he may retain.

Then before you know it, it is almost I think you said 90 percent of it.

This morning he comes in with a complete copy, which did not surprise me.

Throughout the witness' testimony, it seemed that it was difficult to believe.

Now, I don't say that it is not going to go to the jury, but I tell you now, counsellor, that his testimony is near the point of challenging the entire credibility of that witness.

Appendix D
Excerpts from Trial Transcript

That is very rare and in twenty years on the bench, I have never done it and I am not going to do it here.

The jury will make that determination.

MR. GOLD: All I can say, your Honor, is that obviously my impression of his testimony was somewhat different than yours. I don't (95) believe that the Court has completely characterized his testimony in the manner in which it was given, in a fair manner in which it was given.

I don't believe that there is --

THE COURT: Well, it is for that reason that I am not going to indicate that to the jury nor am I going to take it away from the jury on the theory that you may be right and maybe I am wrong. But a transcript of his testimony will be clear that yesterday he testified the reason for the differences, he said there were differences between the exemplar and those on Exhibits 1 and 2, the checks.

The only way he could explain or rationalize the differences and yet make it the same hand that wrote both was to conclude that in the check he was standing up and therefore the letters were upright.

But that in the exemplars, where he was seated, that's an angle to them, so all you had to do was straighten out the angle and you would see that the signatures were so alike that they could not be anything but one and the same scriber.

MR. GOLD: I think the only way I would (96) differ with the Court's conclusion --

THE COURT: Didn't he say that?

MR. GOLD: In part I agree with that. The only distinction being he used the standing up as an example and he repeated incessantly, "I don't know if he was

standing or not. That is a possible explanation for the distinctions within in."

THE COURT: But he explains the distinctions or the differences that way, you see.

MR. GOLD: That, as well as --

THE COURT: Did you hear any other explanation for the differences?

MR. GOLD: I didn't hear any other explanation ruled out either.

This is one that he offered --

THE COURT: Counsellor, the jury will make a determination.

MR. GOLD: That's all I ask.

THE COURT: I will tell you now that I was far from impressed, far from impressed.

Bring the jury in and we will proceed with the defendant's case.

Appendix E
Excerpts from Minutes of Proceeding Dated January 13, 1984 on Motion for Judgment of Acquittal

(181) * * *
and I will make it again that there is no question about it, that the Government witness in my judgment was less than credible.

I did not say he was incredible. I cannot and would not make that statement. It was for the jury to judge the witness' credibility.

It was for them to examine the exemplars and the actual checks that were in evidence. They made a determination. I cannot at this point say that they as a matter of law acted improperly or that a reasonable jury under the circumstances of this case could not have found as they did. I cannot make that statement.

MR. COOPER: Very well, your Honor.

THE COURT: Your motion therefore is denied and I cite *United States v. Taylor*, 464 F.2d, 240, Second Circuit 1982 at page 243. Cert was denied.

That case says that the true rule therefore is that a trial judge in passing upon a motion for a directed verdict of acquittal must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence properly and draw justifiable inferences of fact. The reasonable mind might fairly conclude guilty beyond a reasonable doubt.

If he concludes that upon the evidence there must be such a doubt in a reasonable mind he must grant the motion. Or to state it in another way, if there is no evidence upon which a reasonable person might fairly conclude guilt beyond a reasonable doubt the motion must be granted.

Appendix E
Excerpts from Minutes of Proceeding
Dated January 13, 1984 on Motion
for Judgment of Acquittal

If he can conclude that either of the two results, a reasonable doubt or no reasonable doubt, if fairly possible, he must let the jury decide the matter.

Counsel, it is indeed well settled that it is for the jury as a fact finder to credit or discredit the testimony of a witness. I cite for you *Wright, Federal Practices and Procedures* at Section 467 and 663.

In sum, counsel, while Dr. Smith was evasive and in this Court's estimation less than totally credible, the jury was properly instructed as to its role in assessing credibility of the witnesses. And in fact, this Court, if indeed this trial was a bench trial, would have given greater weight to the defense expert, which is not dispositive of this motion.

(183)

In addition, counsel, in drawing their own conclusions a jury could have very well taken into account their determination as to the signatures and the writing on the exemplars.

The jury need not have relied solely upon Mr. Smith's conclusion, but could themselves compared the handwriting specimens received in evidence with the handwriting in dispute.

I cite to you *United States v. Woodson*, 523 F.2d 550, a Ninth Circuit case, 1975.

I also cite *Straus v. United States*, 311 F.2d 926, Fifth Circuit, 1963.

I think there is little question in my mind on this matter, that a jury with what it had before it could reasonably have found guilt beyond a reasonable doubt.

Your motion is therefore denied.